



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 354 OF 2013

IN THE MATTER OF THE ESTATE OF CNK.....(DECEASED)

AND

AMC.....PETITIONER

V E R S U S

JULIUS MAINA MWANGI.....PROTESTOR

JUDGMENT

1. This matter relates to the estate of CNK (deceased) who died intestate on 29/10/04. A Grant of Letters of Administration was issued to AN and PGN on 1/3/2010. The deceased was survived by:-

- ANG - Wife
- PGN - Son
- AMC – Son.

2. The estate comprised in land parcel No. LR Kiine/Ruiru/[...]. Unfortunately, before the grant could be confirmed one of the petitioners ANG was taken ill with Schizoattective disorder (a form of Chronic Psychiatric illness) a condition which could not allow to follow the proceedings or to testify. She was substituted by her son AMC.

3. The petitioner had filed an application dated 22/10/10 seeking an order that the grant issued on 1/3/10 be confirmed and the estate, Land parcel No. LR Kiine/Ruiru/[...] be registered in her name to hold in trust for her children.

4. This prompted a protest by Julius Maina Mwangi who filed an affidavit of protest against the confirmation of the grant sworn on 16/3/2011.

The Protestor's case:-

He depones that on 25/9/02 he entered an agreement with the deceased for the purchase of a portion of 0.5 acres out of Land parcel No. Kiine/Ruiru/[...] at a consideration of Kshs 50,000/=. He is annexed a copy of the sale agreement JMMI, JMM2 a-b. The deceased handed over to him the original title deed and he instructed a surveyor to sub-divide the land. However, the deceased passed away before he could transfer the land to him. The deceased had allowed him to take possession and he had effected some developments.

5. It is his case that his name has been omitted in the application for confirmation of grant which proposes distribution to other beneficiaries. He proposes that a portion of 0.5 acres be transferred to him or the purchase price paid amounting to Kshs 38,7995/= be paid to him.

6. The parties agreed to proceed by way of written submissions. For the petitioner it is submitted that at the time of his death the deceased had not transferred the portion to the protestor. The estate is still registered in the name of the deceased. In 2008 the protestor without any colour or right entered the land parcel and started committing acts of waste. The petitioner moved to court to preserve the estate. That the protestor is not a beneficiary to the estate of the deceased.

7. The petitioner submits that the authenticity of the documents annexed by the protestor are challenged since they are alien to the petitioner.

8. The petitioner submits that the issues for determination are –

- **Whether the protestor is entitled to 0.5 of an acre out of the estate of the deceased.**
- **Whether the estate should be distributed as prayed by the petitioner.**

9. She submits that under **Section 26(1) of the Land Registration Act** the title is prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner. That the title is still in the name of the deceased and there was no application for consent to effect the transfer and the protestor has never taken possession of the land. The protestor did not produce any documents from the surveyor of the alleged sub-division in 2003. That agreement is null and void for want of the consent of the Land Control Board.

10. On the prayer that the protestor be included in the grant as a beneficiary, the petitioner relies on the case of **Lewis Karungu Waruiro –v- Moses Muriuki Muchiri** where it was held that:-

“All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping SA –v- Edmunds remarked:-

No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take”.

11. It is submitted that the protestor has not discharged the burden of proof. That the terms and condition of the agreement are inconsistent with the information he is adducing in his evidence. He relies on the case of **Miller –v- Minister of Pensions: Lord Denning** – It was stated:-

“if the evidence is such that the tribunal can say. We think it more probable than not the burden is discharged but, if the probabilities are equal, it is not.”

12. It is submitted that it is a fundamental principle of law that a litigant bears the burden or onus of proof in respect of the propositions he asserts to prove his claim. The standard of proof in essence can loosely be defined as the quantum of evidence that must be presented before the court or a fact can be said to exist or not exist. She prays that the protest be dismissed.

13. For the protestor it is submitted that the deceased died intestate and the meaning of intestacy is captured under **Section 34 of the Law of Succession Act**. Which provides:-

“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”

He further refers to **Section 3 of the Law of Succession Act** which defines net estate as:-

“--- the estate of a deceased person after payment of the reasonable expenses, debts and liabilities, expenses of obtaining probate or letters of administration, other reasonable expenses of administration and estate duty, if any.”

14. He submits that the court should distribute the net estate, that is to say the petitioner should either transfer 0.5 Acres out of the estate Kiini/Ruiru/[...] to protestor with conditions as will be set out by this court and/or alternative pay Kshs 146,385/= plus costs.

Determination:

What is before this court as submitted by the protestor is intestate succession as provided under **Section 34 of the Law of Succession Act**. It relates to the administration of the free property of the deceased. This is the property of the deceased which is free from any encumbrances. This is what is the estate of the deceased. Estate under the **Act** is defined as – *“means free property of a deceased person.”*

The Act provides at **Section 2(1):-**

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

15. The **Act** applies in the Administration of the estate of deceased. The jurisdiction of the court is the administration of the estates of deceased person and cannot therefore engage it in determination of civil disputes between administrators and person who are not beneficiaries of the estate.

16. The protestor is not claiming as a beneficiary entitled to the estate. His claim is based on alleged contract for sale of land which he entered with the deceased. The petitioner has claimed that there is a dispute on the authenticity of the documents which the protestor is relying on. As such the question as to whether the protestor has a claim for a portion against the estate of the deceased must be determined not by a succession court whose mandate has been stated under **Section 2 of the Act**, but in my view by a court with competent jurisdiction.

17. The claim to recover land based on contract must first be determined by the court with the competent jurisdiction before it can be enforced against the estate of a deceased person unless it is admitted. Where the claim is disputed which is the case here it must first be determined by a competent court. The claim has not been determined cannot be termed as a debt which is envisaged under **Section 83 (d) of the Law of Succession Act.**

18. Such debt must be ascertained then paid out of the estate of the deceased. It would be detrimental to estate of deceased person if courts were to allow claims against them which are denied and challenged before they are ascertained and determined by the court. It denies the administrator an opportunity to file a substantive defence to the claim and to ascertain the signatures of the deceased from other Government agencies or as the case may be.

19. The protestor has not filed any suit against the estate of the deceased and so whether he has claim against the estate of the deceased has not been determined. He has not proved that he is entitled to a portion of 0.5 acres from the estate of the deceased.

20. The claim by the protestor is based on contract for the purchase of land. **Section 6 (1)(a)(b) of the Land Control Act (Cap 302 of the Law of Kenya)** provides:-

Transactions affecting Agricultural land.

“Each of the following transactions that it to say ---

the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any Agricultural Land which is situated within a Land Control area,

the division of any such Agricultural land into two or more parcels to be held separate titles other than the division of an area of less than Twenty acres into plots in an are to which the development and use of land (planning) Regulations 1961 (LN 576/1961) for the time being apply:”

e.....

is void for all purposes, unless the Land Control Board for the Land Control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

21. There is no dispute that the land in question is an Agricultural land and is in a controlled area. The protestor has not exhibited any application for consent of the Land Control Board which was made during the lifetime of the deceased nor has he displayed any consent of the Land Control Board for the subdivision, sale and transfer. **Section 8(1)** requires that an application for consent be made in the prescribed form within Six months of the making of the agreement but the proviso thereto gives High Court power to extend the period if it considers there are sufficient reasons to do so upon such conditions if any as it may deem fit. **Section 8(2)** requires the Land Control Board either to give or refuse its consent.

Section 22 of the Act provides that where a controlled transaction or an agreement to be a party to a controlled transaction is avoided by **Section 6**

and any person-

a) pays or receives money;

or

b) enters into or remains in possession of the land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of an avoided transaction or agreement that person shall be guilty of an offence and liable to a fine not exceeding Three Thousand Shillings or to imprisonment for a term not exceeding Three months or to both such fine and imprisonment.”

The **Act** therefore makes it an offence for any person to purport to occupy land where the contract is void for want of consent of the Land Control Board.

The **Law of Succession Act** on the other hand makes it an offence to intermeddle with the estate of a deceased person.

Section 45 of the Act provides:-

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding Ten Thousand shillings or to a term of imprisonment not

exceeding One year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

The land in dispute is registered in the name of the deceased. It belongs to his estate **Section 26(1) of the Land Registration Act** provides that a person who holds title to land has prima facie evidence that he is the absolute and indefeasible owner. It is therefore clear that the protestor is relying on a void contract and his purported occupation of the land is an offence under the **Land Control Act and Law of Succession Act**. Even looking at the purported sale agreement on 25/5/2002 the purchase price was not indicated. The title deed was handed over as security for his money. The document further states that payment is by instalment. There is no reference to the money being a purchase price. On the face of it there is doubt as to whether it was a land sale agreement.

22. A void contract is not enforceable and cannot entitle a person to the remedy of specific performance. The protestor cannot therefore claim land under a void contract. The **Court of Appeal in case of Willy Kimutai, Kititit –v- Michael Kibet C. A 51/2015 (ELD) 2018 eKLR** held that:-

“A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void where no application for consent of the Land Control Board is made or if made, it is refused and appeal from refusal is dismissed (see Section 9(2)). The Land Control Act prescribes the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of making of the application to the time of the determination of the appeal, if any may obviously take time. However, the requirement that an application for the consent should be made within Six Months of the making of the agreement and the provisions of Section -7- of the Land Control Act for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.”

23. The agreement which was over Agricultural land required the application for consent be lodged within Six months. In this case no application for consent was made within the prescribed time and it is therefore void. The only claim that can be made under the contract is for recovery of the money paid as purchase price. In this case such money is subject to prove in a court with competent jurisdiction as the respondent has denied any knowledge of the documents relied by the protestor. The respondent swore an affidavit on 4/3/2008 in a summons for preservation of the estate and at Paragraph -3- states that the protestor started interfering with land parcel No. Kiine/Ruiru/[...] on 16/2/2008. There was no denial of these averments and it means that the protestor was never put in possession.

24. The protestor has filed an affidavit of protest. It is filed to oppose the distribution of the estate. It is filed on the presumption that he has a beneficial interest in the estate. **Section 29 of the Law of Succession Act** provides for the meaning of dependants. It provides:-

“(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

The protestor is not such a dependant. I find the protest has no merits. There is no dispute that the respondents are the rightful beneficiaries of the estate of the deceased herein. The petitioner (now substituted) was the wife of the deceased and the other respondents are his children. They are dependants as defined under **Section 29 of the Law of Succession Act**. They are beneficiaries entitled to the estate of the deceased.

25. In conclusion, I find that:-

1. The protest is without merits and is dismissed.

2. The application for confirmation of grant is allowed as prayed. The distribution of the estate be as provided under Section 35 of the Act with the widow having a life interest and the children to share the net estate equally.

3. I award the costs of the protest to the respondents.

Dated at Kerugoya this 29th day of May 2020.

L. W. GITARI

JUDGE